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No. 91-946

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA AND FRANK S. ZOLIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an appeal from an order enforcing an administrative summons becomes moot when the materials sought by the summons have been produced pursuant to the order.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227 (1937)	7
Brownlow v. *Schwartz*, 261 U.S. 216 (1923)	7
Casey v. *FTC*, 578 F.2d 793 (9th Cir. 1978)	10
DeFunis v. *Odegaard*, 416 U.S. 312 (1974)	7
Donaldson v. *United States*, 400 U.S. 517 (1971)	9-10
Gluck v. *United States*, 771 F.2d 750 (3d Cir. 1985)	10, 13
Grand Jury Investigation No. 78-184 (Sells, Inc.), In re, 642 F.2d 1184 (9th Cir. 1981), aff'd *sub nom. United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983)	10
Hintze v. *IRS*, 879 F.2d 121 (4th Cir. 1989)	7, 9, 11
Kurshan v. *Riley*, 484 F.2d 952 (4th Cir. 1973)	8
Mills v. *Green*, 159 U.S. 651 (1895)	6
North Carolina v. *Rice*, 404 U.S. 244 (1971)	6
Preiser v. *Newkirk*, 422 U.S. 395 (1975)	6, 7
SEC v. *Laird*, 598 F.2d 1162 (9th Cir. 1979)	9
Steffel v. *Thompson*, 415 U.S. 452 (1974)	7
United States v. *Arthur Anderson & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980)	12
United States v. *Author Services, Inc.*, 804 F.2d 1520 (9th Cir. 1986)	14
United States v. *Barrett*, 837 F.2d 1341 (5th Cir. 1988), cert. denied, 492 U.S. 926 (1989)	10
United States v. *Blue*, 384 U.S. 251 (1966)	10
United States v. *Church of World Peace*, 878 F.2d 1281 (10th Cir. 1989)	7

Cases—Continued: Page

United States v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979) 8, 11-12
United States v. *Equity Farmers Elevator*, 652 F.2d 752 (8th Cir. 1981) 8
United States v. *First American Bank*, 649 F.2d 288 (5th Cir. 1981) 10, 11
United States v. *First Family Mortgage Corp.*, 739 F.2d 1275 (7th Cir. 1984) 8
United States v. *Kersting*, 891 F.2d 1407 (9th Cir. 1989), cert. denied, 111 S. Ct. 49 (1990) 5, 7, 8, 9, 12
United States v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied , 455 U.S. 1018 (1982) 8, 9, 10
United States v. *Lyons*, 442 F.2d 1144 (1st Cir. 1971) 8, 10
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) 7, 10
United States v. *Sherlock*, 756 F.2d 1145 (5th Cir. 1985) 7, 8, 9
United States v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981) 8, 11
United States v. *Zolin*:
809 F.2d 1411 (9th Cir. 1987), on remand, 491 U.S. 554 (1989) 2, 3, 14
905 F.2d 1344 (9th Cir.), cert. denied, 111 S. Ct. 1309 (1991) 3, 5, 13, 14
Vesco v. *SEC*, 462 F.2d 1350 (3d Cir. 1972) 13

Constitution and statute:

U.S. Const. Art. III 6, 7
§ 2 6
Internal Revenue Code (26 U.S.C.):
§ 6103 10
§ 6501(c)(1) 14
§ 7602(a)(1) 2, 6
§ 7604 ..... 2, 6

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OPINIONS BELOW

The order of the court of appeals (Pet. App. la-2a) dismissing the appeal as moot is unreported.[1] The orders entered by the district court (Pet. App. 3a-11a) on March 13, April 15, and May 21, 1991, are unreported.

[1] The prior opinion of the court of appeals (Pet. App. 13a-15a) following remand from this Court in *United States* v. *Zolin*, 491 U.S. 554 (1989), is reported at 905 F.2d 1344, cert. denied, 111 S. Ct. 1309 (1991).

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1991. The petition for a writ of certiorari was filed on December 9, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, the Internal Revenue Service (IRS) commenced an investigation of the tax returns of L. Ron Hubbard, founder of petitioner (the Church of Scientology), and others, for tax years 1979-1983. In July of 1984, Los Angeles newspapers reported that former Church of Scientology officials had testified in a state court action in California that millions of dollars had been transferred to Hubbard in the late 1970's and early 1980's from various Scientology entities. As part of its investigation, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court seeking documents relating to petitioner's activities from the record of that case.[2] The Clerk's Office, however, refused to produce 13 documents that had been ordered sealed by the Superior Court. The IRS then brought this proceeding in federal district court to enforce its administrative summons. See *United States* v. *Zolin*, 491 U.S. 554, 557-558 (1989).

Petitioner and Mary Sue Hubbard intervened to oppose production of the sealed documents. Petitioner claimed that sealed Exhibit 5-C—which contains tape recordings of two meetings between various attorneys

[2] The Internal Revenue Service is authorized to issue summonses to obtain production of "any books, papers, records, or other data" that may be relevant in "determining the liability of any person for any internal revenue tax" (26 U.S.C. 7602(a)(1)). The district courts have jurisdiction to enforce compliance with these administrative summonses. 26 U.S.C. 7604.

and representatives of petitioner and L. Ron Hubbard (the MCCS tapes)—was protected by the attorney-client privilege. The government contended, however, that the MCCS tapes fell within the crime-fraud exception to the attorney-client privilege. See 491 U.S. at 558.[3] The district court ruled that the MCCS tapes contained confidential attorney-client communications, that the privilege had not been waived and that the crime-fraud exception to the attorney-client privilege did not apply. See *id.* at 559.

2. The court of appeals affirmed. *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987). The court held that the crime-fraud exception may be invoked to compel disclosure of otherwise privileged communications only when the movant has first established a *prima facie* case of fraud with evidence that is independent of the communications themselves. *Id.* at 1418-1419; Pet. App. 40a-41a. The court concluded that there was insufficient "independent evidence" to establish that the crime-fraud exception was applicable to the MCCS tapes. *Ibid.*

This Court granted certiorari and, on June 21, 1989, held that allegedly privileged materials may be reviewed *in camera* to determine whether they fall within the crime-fraud exception to the attorney-client privilege. *United States* v. *Zolin*, 491 U.S. at 562-575. The Court concluded that such *in camera* review is

[3] The affidavits submitted by the government alleged that the taped meetings "focused generally on the intentional violation of the tax laws," and specifically discussed "i) a proposed scheme whereby the Church's cash transfers to Hubbard would be disguised as payments for services rendered (allegedly to insulate Hubbard from tax liability and to protect the Church's tax-exempt status), and ii) a proposed scheme whereby Hubbard would be able to control * * * royalty income * * * without that control being traceable to him." See *United States* v. *Zolin*, 809 F.2d 1411, 1418-1419 (9th Cir. 1987); Pet. App. 40a-41a.

proper when the requesting party has presented relevant, non-privileged evidence that establishes "a reasonable belief that *in camera* review may yield evidence that establishes" the applicability of the crime-fraud exception. *Id.* at 574-575.

3. On remand, the court of appeals examined the partial transcripts of the tapes, along with the independent evidence that it had reviewed in its first opinion, and concluded that there was "sufficient evidence of intended illegality to establish that the tapes are within the crime-fraud exception" (Pet. App. 14a-15a). In so ruling, the court of appeals stated (*id.* at 15a):

> The partial transcripts demonstrate that the purpose of the MCCS project was to cover up past criminal wrong-doing. The MCCS project involved the discussion and planning of future frauds against the IRS in violation of 18 U.S.C. § 371, * * * [and the] figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. Government. The purpose of the crime-fraud exception is to exclude such transactions from the protection of the attorney-client privilege.

On September 19, 1990, the court of appeals denied petitioner's request for rehearing. Petitioner then filed a petition for a writ of certiorari with this Court.

4. Petitioner did not seek a stay of the mandate pending disposition of its petition for a writ of certiorari. When the mandate issued, the district court ordered the MCCS tapes to be produced to the government. On petitioner's motion, however, the district court thereafter ordered the government to return the tapes to the clerk of the district court until this Court acted on the pending certiorari petition (Pet. App. 7a-11a).

On March 18, 1991, this Court denied the petition for a writ of certiorari. *Church of Scientology* v. *United States*, 111 S. Ct. 1309. The district court then entered its order requiring the MCCS tapes to be delivered to the IRS. In response to petitioner's renewed efforts to relitigate the merits of this case, the district court observed that petitioner "cannot win in this court a case which it lost in the Supreme Court and the Court of Appeals" (Pet. App. 6a). Noting that "[l]itigation must end sometime" (*ibid.*), the district court refused to stay its order pending appeal. The court did, however, grant a brief, temporary stay to allow petitioner an opportunity to seek a stay pending appeal from the court of appeals (*ibid.*).

5. On May 6, 1991, the court of appeals denied petitioner's motion for a stay. Petitioner's application to this Court for a stay was denied by Justice O'Connor on May 8, 1991. The MCCS tapes were then released to the United States Attorney, and copies of the tapes were delivered to the Internal Revenue Service.

On May 24, 1991, petitioner filed a renewed emergency motion for a stay pending appeal. On May 30, 1991, the court of appeals denied that motion and ordered petitioner to show cause why its appeal should not be dismissed as moot.[4] On September 10, 1991, the court of appeals dismissed the appeal, concluding that this case is moot because "the tapes have been turned over to the IRS in compliance with the summons enforcement order" and no actual, present controversy therefore exists (Pet. App. 2a, citing *United States* v. *Kersting*, 891 F.2d 1407, 1410 (9th Cir. 1989), cert. denied, 111 S. Ct. 49 (1990)).

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[4] On May 31, 1991, the Church filed a second emergency motion for a stay pending appeal. That motion was denied by the court of appeals on the same day.

ARGUMENT

1. An IRS summons may be issued to obtain information that "may be relevant" in determining the liability of any person for federal taxes. 26 U.S.C. 7602(a)(1). The agency has no power to enforce its summons directly; instead, it must apply to a federal district court for an order compelling compliance. See 26 U.S.C. 7604. An order enforcing the summons does not adjudicate that the information sought is admissible in further proceedings concerning the taxpayer's liabilities. Like other discovery orders issued by a district court, it merely determines that the information sought "may be relevant" for that purpose. See 26 U.S.C. 7602(a)(1).

In opposing enforcement of the summons issued in this case, petitioner sought to prevent disclosure to the IRS of information that may be relevant in determining the taxes of L. Ron Hubbard and others. Because this information has now been disclosed to the IRS, and because the potential admissibility of that information in further proceedings (if any) that may occur in determining such tax liabilities is not presently ripe for consideration, there is no present controversy between the parties that is proper for judicial disposition.

Under Article III, Section 2 of the Constitution of the United States, the judicial power of the United States extends only to "cases" and "controversies." It is the duty of a court "to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U.S. 651, 653 (1895); see generally *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). The "actual controversy" that is required must exist "at all stages of review, not merely at the time the complaint is filed."

Preiser v. *Newkirk*, 422 U.S. at 401; *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). A case that presented a live controversy when the complaint was filed may become moot prior to entry of the district court's decision or on appeal or after a petition for a writ of certiorari has been filed. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316-320 (1974). If the relief a party seeks is no longer available, the case no longer "touch[es] the legal relations of parties having adverse legal interests," is not an Article III case or controversy, and must be dismissed as moot. See *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937); *Brownlow* v. *Schwartz*, 261 U.S. 216, 217-218 (1923) (where the defendant municipality had complied with the trial court's order to issue plaintiff a building permit prior to the hearing on appeal, the defendant's appeal was deemed moot since no relief could be obtained by either party).

In the present case, the court of appeals held that the MCCS tapes were within the scope of the crime-fraud exception and should be produced pursuant to the summons (Pet. App. 15a). Since those documents have now been produced to the IRS pursuant to the summons, there is no continuing, live controversy with respect to whether the information on the tapes may be disclosed to the IRS. Because that is the only issue to be addressed in proceedings concerning enforcement of the summons, any further opinion that a court might render in this case would be advisory in nature. The court of appeals therefore properly dismissed the appeal as moot. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950); *United States* v. *Kersting*, 891 F.2d 1407, 1410 n.8 (9th Cir. 1989), cert. denied, 111 S. Ct. 49 (1990); *Hintze* v. *IRS*, 879 F.2d 121, 124-125 (4th Cir. 1989); *United States* v. *Church of World Peace*, 878 F.2d 1281 (l0th Cir. 1989); *United*

States v. *Sherlock*, 756 F.2d 1145, 1146-1147 (5th Cir. 1985); *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1278-1279 (7th Cir. 1984); *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Equity Farmers Elevator*, 652 F.2d 752 (8th Cir. 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710, 711 (9th Cir. 1981); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971).

2.a. Petitioner argues (Pet. 9-14, 21) that this case is not moot because the courts could grant effective relief by ordering the return of the MCCS tapes and any documents derived from them. The argument is incorrect and has been rejected routinely by all but one of the courts of appeals.

In a summons enforcement proceeding, the government seeks only to obtain access to information. Once the parties have complied with the summons, the information at issue has been fully disclosed to the government: a decision reversing an enforcement order could not alter the fact that the records have been produced and could not erase the knowledge obtained from those records. When, as here, the particular rights that are the subject of an appeal—access for the IRS to information contained on the MCCS tapes—are no longer subject to effective redress by the courts, no case or controversy exists to support the continuing exercise of federal jurisdiction. For this reason, as the Ninth Circuit noted in *United States* v. *Kersting*, 891 F.2d at 1410 n.8, "[e]very circuit that has considered this question, except the Third Circuit, see *Gluck* v. *United States*, 771 F.2d 750, 754 (3d Cir. 1985), has held that compliance with an IRS summons moots an appeal of the enforceability of the summons." *Ibid.*

Notwithstanding this clear authority, petitioner contends (Pet. 11-12, 21) that the court of appeals could have granted effective relief in this case by ordering the return of the tapes and material derived therefrom. As the court of appeals noted (Pet. App. 15a n.2), however, it is well established that questions of suppression of evidence obtained under an IRS summons are not ripe for consideration until such time as the government seeks to offer the discovered materials as evidence in some later proceeding. *United States* v. *Kis*, 658 F.2d at 533. There is here, as in the ordinary case, nothing but speculation to suggest that the government will hereafter offer these materials in evidence in some proceeding. If it does so, the affected parties will then be free to challenge the introduction of the materials at that time.[5] Because this potential controversy concerning future uses that may be made of the summoned information is merely hypothetical,[6] there is "no need, nor would it be proper, to decide that question now." *Ibid.* Accord *United States* v. *Kersting*, 891 F.2d at 1411; *Hintze* v. *IRS*, 879 F.2d at 125; *United States* v. *Sherlock*, 756 F.2d at 1147; *SEC* v. *Laird*, 598 F.2d 1162, 1163 (9th Cir. 1979) (appellants may adequately protect their interests in administrative subpoena cases by moving to suppress subpoenaed information in subsequent proceedings). See *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971); *United States* v. *Munsingwear, Inc.*, 340 U.S. at 39-40 ; *United States*

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[5] This Court denied certiorari in March 1991 from the court of appeals' ruling on the merits of the crime-fraud issue. It is therefore improbable that petitioner would prevail in any indirect or collateral attack on that ruling.

[6] At petitioner's request, the district court directed the IRS not to deliver the summoned information to other government agencies except under certain, limited circumstances (Pet. App. 4a). That aspect of the court's order is not at issue in this petition.

v. *First American Bank*, 649 F.2d 288, 289 n.3 (5th Cir. 1981); *United States* v. *Lyons*, 442 F.2d 1144, 1145 (1st Cir. 1971). Cf. *United States* v. *Blue*, 384 U.S. 251, 254 (1966). [7]

Petitioner errs in relying on *In re Grand Jury Investigation No. 78-184 (Sells, Inc.)*, 642 F.2d 1184 (9th Cir. 1981), aff'd *sub nom. United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), for the proposition that the government's possession of the summoned information is a "continuing" wrong (Pet. 20) that justifies continuing jurisdiction. In *Sells*, the Ninth Circuit held that an appeal involving allegations of impropriety in the disclosure of grand jury materials was not moot because prospective relief preventing further disclo-

[7] As noted above, *Gluck* v. *United States*, 711 F.2d 750, 754 (3d Cir. 1985), is the only contrary circuit authority. In *Gluck*, the Third Circuit reasoned that a case is not moot after compliance with a summons because the court can order suppression of illegally obtained evidence. *Ibid.* As the Seventh Circuit correctly ruled in *United States* v. *Kis*, 658 F.2d at 533, however, "[i]t would be highly speculative" to rule on the legality of an IRS summons *after* compliance "for there is no guarantee that the Government will ever seek to use" the summoned evidence (*ibid.*). A ruling on the merits in this context would simply be an advisory opinion. As petitioner concedes (Pet. 14), "on the precise narrow issue presented here," the Third Circuit is the only circuit to reach a different conclusion.

Contrary to petitioner's contentions (Pet. 12-13), the decision in *Casey* v. *FTC*, 578 F.2d 793, 796 (9th Cir. 1978), is not inconsistent with these decisions. In *Casey*, the Ninth Circuit held that compliance with an FTC subpoena had not mooted an appeal even though the appellant had produced all of the requested documents. In so ruling, the Ninth Circuit emphasized that, since the documents had not been verified, as required by the subpoena, full compliance had not occurred and the controversy was therefore still live. *Id.* at 798. See also *United States* v. *Barrett*, 837 F.2d 1341, 1348 (5th Cir. 1988) (en banc), cert. denied, 492 U.S. 926 (1989) (IRS summons enforcement not moot where case involved issues pertaining to alleged violations of Section 6103 of the Internal Revenue Code).

sures could be granted by the trial court if the secrecy of the grand jury were violated. 642 F.2d at 1187-1188. There is no suggestion in the present case, however, that improper, future disclosures will occur. To the contrary, the district court has expressly limited the circumstances under which the IRS may disclose these documents to other federal agencies (Pet. App. 4a), and the scope of this restriction is not at issue in this case. See note 6, *supra*. The speculative possibility that a future controversy may arise concerning implementation of a final order relating to future disclosures *by* the IRS cannot serve as a basis for continuing jurisdiction over a case that concerns the moot question whether disclosures are to be made *to* the IRS.

b. Finally, petitioner contends (Pet. 14-22) that the fact that the documents at issue were surrendered to the IRS by a third party, rather than by petitioner directly, prevents this case from being moot. That difference in the method of compliance with the summons does not create a distinction for the purpose of the constitutional case or controversy requirement. Contrary to petitioner's contentions (Pet. 14-18), the many decisions that hold that compliance with an IRS summons renders moot further litigation concerning enforcement of the summons are not limited to situations where a taxpayer, as distinguished from a disinterested third party, complies with the summons. See, *e.g.*, *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d at 711 (taxpayer's appeal of order enforcing IRS summons mooted by accountant's compliance with summons); *Hintze* v. *IRS*, 879 F.2d at 124-125 (third-party bank's compliance with IRS summons enforcement order precluded exercise of appellate jurisdiction); *United States* v. *First American Bank*, 649 F.2d at 289 (same); *United States* v. *Deak-Perera International Banking Corp.*, 610 F.2d at 89 (same).

The two allegedly conflicting cases on which petitioner purports to rely (Pet. 16-17, citing *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720, 724 (1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Kersting*, 891 F.2d at 1411 n.9) do not support the conclusion that compliance with a summons by a disinterested third party does not moot an appeal. In *Arthur Andersen & Co.*, the court of appeals held that an appeal from a summons enforcement order by an accounting firm that was not the target of the investigation was made moot by its compliance with the summons. In so holding, the court rejected the accountants' contention that their appeal fell within the category of cases that are excepted from mootness on the theory that they are "capable of repetition yet evading review." 623 F.2d at 723. As the court observed, as is the case with a party that is itself the target of a tax investigation, a third party "can refuse to comply and litigate the merits of the summons as a defense to a contempt citation." *Ibid.*[8] And, in *United States* v. *Kersting*, the court simply observed that it did not have a "disinterested third party" before it and thus expressed no opinion as to whether that would have any bearing on its analysis. 891 F.2d at 1411 n.9. Thus, nothing in *Arthur Andersen & Co.* or *Kersting* supports petitioner's claim that an appeal is not moot when a party other than the taxpayer complies with an IRS summons.

c. While we acknowledge that the Third Circuit's decision in *Gluck* is inconsistent with the numerous

[8] In *Arthur Andersen & Co.*, the court of appeals declined to decide whether a case involving a third party that lacked "sufficient incentive to risk contempt in order to avoid compliance with [a] summons" would present a "compelling circumstance[]" that would justify "deciding an otherwise moot case." 623 F.2d at 725. No court has held that a moot case becomes justiciable if "compelling circumstances" exist.

decisions of other circuits holding summons enforcement cases to be moot in these circumstances, it is unnecessary for the Court to resolve that conflict in this case. As Judge Garth stated in his dissent in *Gluck*, 771 F.2d at 759-760, the court's holding in that case conflicts with the earlier Third Circuit decision in *Vesco* v. *SEC*, 462 F.2d 1350 (1972). Judge Garth urged that this intracircuit conflict be resolved by that court en banc (771 F.2d at 761). Now that the position of the other circuits on this question has been made clear through intervening decisions, the Third Circuit should be given an opportunity to reconsider en banc its singular position on this issue before further review in this Court would be warranted.

3. Petitioner's contentions in this eight-year-old summons enforcement case ultimately are based on its demonstrably erroneous assumption that three questions concerning the validity of the summons remain unresolved. Each of the three arguments petitioner seeks to raise (Pet. 6) on the merits has previously (and finally) been decided against petitioner.

a. First, petitioner asserts (Pet. 6) that the IRS illegally obtained the partial transcripts of the tapes. As the court of appeals held in its opinion on remand from this Court, however, petitioner has previously waived any claims it may have concerning this issue (905 F.2d at 1346 n.2 (emphasis added)):

> The issue of the potential illegality of the transcripts, mentioned by the Supreme Court, *see Zolin*, 109 S. Ct. at 2624 n.5, is not properly before this Court. *The Church did not raise this issue in its original appeal, and we will not consider it on a later remand.*

b. Second, petitioner has previously litigated and lost on its argument (Pet. 6) that the district court should

have reviewed the full contents of the tapes before ordering them released to the government. Following the court of appeals' ruling on remand that the MCCS tapes fell within the scope of the crime-fraud exception, petitioner filed a petition for rehearing with suggestion for rehearing en banc in which it argued (at 11 n.8) that the district court should be required to review the tapes *in camera* prior to disclosure to ensure that the crime-fraud exception in fact applied. That petition for en banc rehearing was denied by the court of appeals on September 19, 1990, and this Court denied petitioner's subsequent petition for certiorari on this issue on March 18, 1991. 111 S. Ct. 1309.

c. Third, this Court has already rejected petitioner's further argument (Pet. 6) that, since the criminal component of the IRS investigation has been terminated and the civil component allegedly has been completed, there is no longer any legitimate purpose for the summons. *United States* v. *Zolin*, 491 U.S. at 557 n.3. Accord *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1522 n.1(9th Cir. 1986); *United States* v. *Zolin*, 809 F.2d at 1414. [9]

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[9] The IRS has the power to conduct an investigation for fraud at any time. See 26 U.S.C. 6501(c)(1).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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